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IN THE

Supreme Court of the United States

October Term, 1952

No. 10 Original

STATE OF ARIZONA

Complainant

v

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA AND COUNTY OF SAN DIEGO, CALIFORNIA.

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COMPLAINANT'S OBJECTIONS TO MOTION ON BEHALF OF SIDNEY KARTUS ET AL. FOR LEAVE TO FILE PETITION TO INTERVENE

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COMPLAINANT'S OBJECTIONS TO MOTION ON BEHALF OF SIDNEY KARTUS, ET AL. FOR LEAVE TO FILE PETITION TO INTERVENE

The State of Arizona, appearing by its duly appointed attorneys, respectfully files herewith its objections to motion on behalf of Sidney Kartus, et al. for leave to file petition to intervene.

ISSUE I

The State of Arizona has a right to appear as *parens patriae* of its citizens regardless of the rights of individual and private appropriators or users of waters of interstate streams, inasmuch as a determination of the rights of the State of Arizona will necessarily determine petitioners' rights.

ISSUE II

The enactment of Section 75-2201 et seq, A.C.A. 1939, 1952 Cumulative Supplement, establishes the Arizona Interstate Stream Commission and empowers said Commission to prosecute and defend all rights, claims and privileges of the State respecting interstate streams and by virtue of said legislative enactment any other person or officer is prevented from instituting an action which relates to interstate streams.

ISSUE III

The Eleventh Amendment to the Constitution of the United States prevents petitioners from intervening.

ARGUMENT IN SUPPORT OF OBJECTIONS

ISSUE I

The petitioners should not be allowed to intervene in this action for the reason that any decree entered by the Court will operate as an adjudication of the petitioners' rights. All persons within the confines of a state are bound by an interstate compact which apportions water among the several states.

The outstanding case determined by the Supreme Court of the United States is *Hinderlider, State Engineer, et al. v. La Plata River & Cherry Creek Ditch Co.*, (1937) 304 U.S. 92. This was a case determined on an appeal from the Supreme Court of the State of Colorado. One of the points determined in that case was the effect of an interstate compact on an appropriator of water within the State of Colorado who had by decree of the Colorado Court been allocated a certain

amount of water from the La Plata River. The decree of the state court establishing the water right was entered in 1898 and a compact was signed between the States of Colorado and New Mexico with the permission of Congress in 1923. The Compact did not apportion sufficient water to the State of Colorado to take care of the 1898 Court decree. One of the contentions was that the State could not by compact interfere with the decree of the Colorado Court rendered in 1898. The Court held (Page 106) as follows:

"Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact. That the private rights of grantees of a State are determined by the adjustment by Compact of a disputed boundary was settled a century ago in *Poole v. Fleeger,* 11 Pet. 185, 209, where the Court said:

'It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union; unless it has been surrendered under the Constitution of the United States. So far from there being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress'."

In addition the Court cited *Garcia v. Lee*, 12 Pet. 511, 521; *Rhode Island v. Massachusetts*, 12 Pet. 657, 725; *Coffee v. Groover*, 123 U.S. 1, 29, 30, 31; *Virginia v. Tennessee*, 148 U.S. 503, 525; *Wyoming v. Colorado*, 286 U.S. 494, 508.

In the case of *Nebraska v. Wyoming*, (1935) 295 U.S. 40, Nebraska, by leave of Court, filed a bill of complaint against Wyoming seeking an equitable apportionment as between the two States of the waters of the North Platte River. The State of Wyoming presented a motion to dismiss, asserting that the Secretary of the Interior was an indispensable party. In disposing of the question the Court held:

> "* * * The motion asserts that the Secretary of the Interior is an indispensable party. The bill alleges, and we know as matter of law, that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. *His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand in judgment for him as for any other appropriator in that state. He is not a necessary party.* * * *"
> (emphasis supplied)

Subsequently the Platte Valley Public Power & Irrigation District filed a motion for leave to intervene which motion was denied by memorandum decision of this Court. 296 U.S. 548. Similarly this Court in *Texas v. New Mexico*, 304 U.S. 551 denied a motion for leave to file a brief amicus curiae.

The effect of a decree of the Supreme Court of the United States in a suit of original jurisdiction between States, as concerns private claimants of water rights within the respective states was determined in the case of *State of Wyoming v. State of Colorado* (1932) 286 U.S. 494. This was a suit brought by the State of Wyo-

ming against the State of Colorado to enforce a prior decree of the Supreme Court rendered in an earlier suit between the two States respecting their relative rights to divert and put to beneficial use the waters of the Laramie River, a stream rising in Colorado and flowing northward into Wyoming. The Court in this case used the following language:

> "* * * (3) But it is said that water claims other than the tunnel appropriation could not be, and were not, affected by the decree, because the claimants were not parties to the suit or represented therein. In this the nature of the suit is misconceived. It was one between states, each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other. Counsel for Colorado insisted in their brief in that suit that the Controversy was 'not between private parties' but 'between the two sovereignties of Wyoming and Colorado'; and this court in its opinion assented to that view, but observed that the controversy was one of immediate and deep concern to both states and that the interests of each were indissolubly linked with those of her appropriators. 259 U.S. 468, 42 S. Ct. 552, 66 L. Ed. 999. Decisions in other cases also warrant the conclusion that the water claimants in Colorado, and those in Wyoming, were represented by their respective states and are bound by the decree.* * *"

In the present controversy, the State of Arizona will stand in judgment for the petitioners, for their rights can rise no higher than the rights of the State of Arizona and the effect of any judicial determination of this controversy between the two states will be binding upon petitioners as individual citizens. Citations of various Supreme Court cases which follow this principle are:

Missouri v. Illinois, 180 U.S. 208, 241;

Kansas v. Colorado, 185 U.S. 125, 142; Id., 206 U.S. 46, 49;

Georgia v. Tennessee Copper Co., 206 U.S. 230, 237, 11 Ann. Cas. 488;

Hudson County Water Company v. McCarter, 209 U.S. 349, 355, 14 Ann. Cas. 560;

Pennsylvania v. West Virginia, 262 U.S. 533, 591, 595, 32 A.L. R. 300;

North Dakota v. Minnesota, 263 U.S. 365, 373;

Rhode Island v. Massachusetts, 12 Pet. 657, 748;

Florida v. Georgia, 17 *How.* 478, 494, 510, 522.

The right of a State, in its sovereign or quasi sovereign capacity to represent its citizens, has been ruled upon in many instances from early English law to the present date. One of the most concise statements of this rule is found in the case of *Commonwealth of Kentucky v. State of Indiana, et al* (1930) 281 U.S. 163, where the Commonwealth of Kentucky filed a bill of complaint against the State of Indiana, seeking to restrain the breach of a contract and for specific performance of said contract. In passing upon the right of the State to represent its citizens the Court held:

"* * * (2) *A state suing, or sued, in this court, by virtue of the original jurisdiction over controversies between states, must be deemed to represent all its citizens.* The appropriate appearance here of a state by its proper officers, either as complainant or defendant, is conclusive upon this point. Citizens, voters, and taxpayers, merely as such, of either state, without a showing of any further and proper interest, have no separate individual right to contest in such a suit the position taken by the state itself. Otherwise, all the citizens of both states, as one citizen, voter, and taxpayer has as much right as another in this respect, would be entitled to be heard. * * *" (emphasis supplied)

In *State of Kansas v. Colorado*, (1902) 185 U.S. 125, at page 142, the Court, in speaking of its ruling in *State of Missouri v. Illinois*, (1900) 180 U.S. 208, said:

"As will be perceived, the court there ruled that the mere fact that a state had no pecuniary interest in the controversy would not defeat the original jurisdiction of this court, which might be invoked by the state as *parens patriae,* trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between states, under the authority of one of them thereby putting the health and comfort of the citizens of the other in jeopardy, presented a cause of action justiciable under the Constitution."

In *State of Wyoming v. Colorado,* (1922) 259 U.S. 419, it was contended, among other things, that actually the real parties in interest were the private appropriators of the water. As to that contention, the Court said, 259 U.S. at page 468:

"As respects Wyoming, the welfare, prosperity, and happiness of the people of the larger part of the Laramie Valley, as also a large portion of the taxable resources of two counties, are dependent on the appropriations in that state. Thus the interests of the state are indissolubly linked with the rights of the appropriators. To the extent of the appropriation and use of the water in Colorado a like situation exists there."

In *State of Kansas v. Colorado* (1907), 206 U.S. 46, at page 99, the Court said, in speaking of the status of Kansas in that suit:

"It is not acting directly and solely for the benefit of any individual citizen to protect his riparian rights. Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, *above a mere question of local private right and involves a matter of state interest, and must be con-*

sidered from that standpoint. State of Georgia v. Tennessee Copper Co., 206 U.S. 230, (11 Ann. Cas. 488)." (emphasis supplied)

See also:

State of Georgia v. Tennessee Copper Co., (1907), 206 U.S. 230-237, 11 Ann. Cas. 488;

People of State of New York v. New Jersey (1921) 256 U.S. 296-301;

State of New Jersey v. New York (1931), 283 U.S. 336, 342;

State of Wyoming v. Colorado (1936), 298 U.S. 573, 585;

State of Colorado v. Kansas (1934), 320 U.S. 383, 394.

The State, acting in its capacity as *parens patriae,* through the Arizona Interstate Stream Commission, adequately represents all claimants of water rights within the State, and none of such claimants should be made party to this action. Were the rule otherwise, it would leave the way open for hundreds, even thousands of other persons to intervene in the instant case seeking to have their various individual rights determined by the Supreme Court. This would create an intolerable situation and place so many litigants before the Court that substantial justice could not be accomplished.

Issue II

The State of Arizona must be represented by an agent or agency authorized to act and petitioners have nowhere shown that the Legislature has empowered them to act on behalf of the State. Inasmuch as the petitioners' rights are merged with those of the State of Arizona, their attempt to intervene actually places them in a position where they are asserting the rights of the State. This they may not do. The only properly authorized agency is the Arizona Interstate Stream Commission. In *People v. Navarre,* 22 Mich. 1 an action of debt had been commenced in the name of the

State without authority of the officer authorized by law to commence such action in the name of the State. In the course of the opinion it is said:

> "But the plaintiff in error (the people) can only appear in this class of cases by some public officer designated by law. They cannot be placed in the attitude of litigants in the courts at the will and by action of private parties or attorneys. The State can only be recognized by the courts as a suitor in legal proceedings through the agents or representatives appointed by law to speak and act in its name in the matter in hand; and, unless in the given case the proper agent or representative is present, in legal contemplation the State is not present; and this presence of such agent or representative can be made known and attested only by the record. * * * While, therefore, the People are designated as plaintiffs in error in the papers before us, they are not present, indeed are not, according to legal apprehension, parties at all."

The legislative enactment by which this Commission is created is found in Section 75-2202, A.C.A. 1939, 1952 Cumulative Supplement, which provides as follows:

> "75-2202. *Arizona interstate stream commission.*—The Arizona interstate stream commission is created as a body corporate, with the right to sue and be sued in its own capacity, and with all corporate rights and privileges of general bodies corporate except as otherwise provided by this act (SS 75-2201 — 75-2211). It shall have power, jurisdiction and authority to:
>
> 1. Prosecute and defend all rights, claims and privileges of the state respecting interstate streams.
> * * *"

The enactment of the above statute prevents any other person, including petitioners, from instituting or maintaining an action which relates to interstate streams. The general rule concerning the authority of

a certain officer or public body to institute or defend actions is set out in 59 C.J. 322, paragraph 480. This paragraph reads, in part, as follows:

> "Generally, therefore, any person expressly authorized by statute may institute, or defend, an action on the state's behalf; and when the legislature has authorized an action to be instituted or defended by a particular person or officer, the suit may not be instituted or defended, by another;"

It appears that the great weight of authority, if not the entire weight of authority, is in support of this general rule. In the case of *State v. Pure Oil Co.* (Okla. 1934) 37 P. 2d 608, a statutory enactment provided that "The Bank Commissioner shall have power and authority to institute and prosecute all suits necessary for the liquidation of the assets of the insolvent corporations taken over by him and such suits shall be brought in the name of the State of Oklahoma, on the relation of the Bank Commissioner." A question was raised as to whether the power thus conferred on the Bank Commissioner was exclusive. In passing upon the question the Court held:

> "It is the general rule of law that, when the legislative branch of the government has declared that certain classes of cases shall be prosecuted in the name of the state by designated persons or officers, such cases must be maintained by the person or officer designated and cannot be maintained by any other person or officer."

The Oklahoma Court in *Oklahoma Benefit Life Ass'n v. Bird* (Okla. 1943) 135 P. 2d 994, re-affirmed the general rule as applied to the power of the Insurance Commissioner to institute judicial proceedings. The Court used the following language:

> "And the general rule is that where the Legislature has declared that certain classes of cases shall be prosecuted in the name of the state by designated persons or officers, such cases cannot be maintained by any other person."

See also *Commonwealth v. Helm*, 163 Ky. 69, 173 S.W. 389.

The propriety of this rule is obvious. If it were otherwise, private citizens of the State could flood the courts with litigation on a certain problem, although the duty is lodged with regularly selected state officials or in officers or corporate bodies whose duties have been clearly defined by statute. As was stated in *State v. Pure Oil Co., supra,* "The necessity of orderly and harmonious government demands that the rule be observed."

Issue III

The Eleventh Amendment to the Constitution of the United States provides:

> "*(Suits against states — Restriction of judicial power.)*—The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The question as to whether or not a citizen of a State may sue one of the states of the Union has been determined in numerous cases. One of the leading cases in the field is *Monaco v. Mississippi* (1934) 292 U.S. 313. The Court in determining the effect of the Eleventh Amendment used the following language:

> "3. *To suits against a State, without her consent, brought by citizens of another State or by citizens or subjects of a foreign State, the Eleventh Amendment erected an absolute bar.* Superseding the decision in *Chisholm v. Georgia*, 2 Dall. 419, 1 L. ed. 440, supra, the Amendment established in effective operation the principle asserted by Madison, Hamilton, and Marshall in expounding the Constitution and advocating its ratification. The 'entire judicial power granted by the Constitution' does not embrace authority to entertain such suits in the absence of the State's consent. Re New York, supra, (256 U.S. 497, 65 L. ed.

1060, 41 S. Ct. 588); *Missouri v. Fiske,* 290 U.S. 18, 25, 26, ante, 25, 54 S. Ct. 18." (emphasis supplied).

It is apparent from the Eleventh Amendment that its prohibitory effect extends to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State. The question presents itself as to whether or not an intervener in a case is in the position of one who commences or prosecutes a case. 30 C.J.S. 608, paragraph 163 states the general rule as to the effect of an intervention in the following language:

"An intervener by leave of court becomes a party for all purposes of the suit as though originally a party."

In support of the general rule, the District Court for the Southern District of New York, *In re Raabe, Glissman & Co.* (1947) 71 F. Supp. 678, states at page 680 as follows:

"(1, 2) Under Rule 24 of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, *an intervenor in an action or proceeding is, for all intents and purposes, an original party.* * * *" (emphasis supplied)

See also *Commercial Electrical Supply Co. v. Curtis* (1923) 288 F. 657, where the Circuit Court of Appeals laid down the following rule at page 659:

"(1) It is the general rule that one who voluntarily intervenes in a suit in equity thereby becomes a party to the suit, is in the same situation, bound by the same orders and decrees, and subject to the same estoppels, as though he had been a party from the commencement thereof. *Frank v. Wedderin,* 68 Fed. 818, 822, 823, 16 C.C.A. 1; *Swift v. Black Panther Oil & Gas Co.* (8th C.C.A.) 244 Fed. 20, 28, 29, 156 C.C.A. 448; *Bowdoin College v. Merritt* (C.C.) 59 Fed. 6. 8; *Jack & Toner v. D. M. & Fort Dodge Ry. Co.,* 49 Iowa 627, 629; 2 Foster, Federal Practice, p. 1313, S. 259d. * * *"

The petitioners if allowed to intervene would become original parties in the instant case and *in effect, would be commencing or prosecuting a suit against California, which is prohibited by the Eleventh Amendment, supra.*

Should petitioners be allowed to intervene the State of Arizona would be suing to enforce individual rights of the petitioners and this, also, would be in violation of the Eleventh Amendment. Such circumstances should be distinguished from the right of a State to represent all of its citizens as *parens patriae*. This distinction has been brought out in the case of *State of North Dakota v. State of Minnesota* (1923) 263 U.S. 365. In that case North Dakota sought $5,000 for itself and $1,000,000 for its inhabitants, from the State of Minnesota. Recovery was held to be forbidden by the Eleventh Amendment inasmuch as the State was seeking relief for its individual inhabitants.

Conclusion

Whether to permit intervention in any case is a matter which lies within the sound discretion of the Court. As a general rule only those who have rights which are not being adequately protected in the proceedings are permitted to intervene.

Where a person is already represented in the proceedings the courts universally refuse intervention.

The State of Arizona acts as representative of all of its citizens in this litigation and its legislature has by proper statute created the Arizona Interstate Stream Commission and given to it the exclusive right to prosecute and defend all rights, claims and privileges of the State respecting interstate streams.

The granting of petitioner's motion would constitute a violation of the Eleventh Amendment to the Constitution of the United States. For the foregoing reasons the motion for leave to file a petition to intervene should be denied.

Respectfully submitted,

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